

Notice

CC-2009-021

June 30, 2009

Litigating Cases Involving Claims for
Relief From Joint and Several
Liability Under Section 6015(f):
Subject: Scope and Standard of Review
Cancel Date: Upon incorporation
into CCDM

Purpose

This Notice provides guidance with respect to the scope and standard of review in cases involving requests for relief from joint and several liability under section 6015(f). This Notice supplements Chief Counsel Notice CC-2004-26 (July 12, 2004).

Discussion

In Porter v. Commissioner, 130 T.C. 115 (2008) ("Porter I"), the Tax Court, following its prior opinion in Ewing v. Commissioner, 122 T.C. 32 (2004), vacated, 439 F.3d 1009 (9th Cir. 2006), denied the Commissioner's motion in limine and held that in determining whether the Commissioner abused his discretion in denying the petitioner relief under section 6015(f), the court conducts a trial de novo and may consider evidence introduced at trial that was not included in the administrative record developed during the administrative consideration of the claim. In Porter v. Commissioner, 132 T.C. No. 11 (April 23, 2009) ("Porter II"), the court reconsidered the standard of review in section 6015(f) cases and concluded that a de novo standard of review is proper. Under Porter I and Porter II, the Tax Court now will make its own de novo determination regarding whether a requesting spouse is entitled to relief under section 6015(f) and will not be limited to evidence in the administrative record.

Distribute to: ☒ All Personnel
☒ Electronic Reading Room

Filename: CC-2009-021 File copy in: CC:FM:PF

A. Litigation of Section 6015(f) Issues

In all section 6015(f) cases the proper standard of review is abuse of discretion. Attorneys should, therefore, continue to argue that, under an abuse of discretion standard of review, the scope of the Tax Court's review is limited to issues and evidence presented before Appeals or Examination. Attorneys should raise the scope and standard of review arguments whenever appropriate (e.g., in the pre-trial memo, at trial, and on brief), noting the Service's disagreement with the holding in the Porter opinions.

To preserve the Porter issues for appeal, attorneys should continue to work with the petitioner to stipulate to the administrative record and should continue to raise a continuing evidentiary objection if the petitioner attempts to testify or otherwise enter evidence into the record that was not made available to the Service's examiner or Appeals Officer. If the court denies the evidentiary motion, additional evidence outside of the administrative record that may strengthen the Commissioner's case should be introduced into evidence.

If the Tax Court admits evidence of matters not available to the Commissioner during the administrative proceeding, the following alternative arguments should be made on brief. First, after stating that it is the Commissioner's position that the proper standard of review is for abuse of discretion, the argument is that, based solely on the administrative record, the Commissioner did not abuse his discretion in denying relief. Second, even considering the new facts and evidence raised at trial, the Commissioner did not abuse his discretion. Finally, even if the proper standard of review is de novo, the petitioner has not met the burden of establishing eligibility for relief from joint and several liability under section 6015(f). All briefs in cases involving this issue require National Office review.

B. Requests to CCISO to Make a Determination Regarding Relief

All cases in which the Commissioner did not have the opportunity to make a determination considering all the factors for relief (i.e., cases in which a taxpayer raises relief from joint and several liability under section 6015 for the first time in a petition to the Tax Court from a Notice of Deficiency or when the taxpayer petitions after six months from filing a claim for relief with the Commissioner but before a determination on the claim is issued) should be expeditiously identified. The Cincinnati Centralized Innocent Spouse Operations (CCISO) should be requested to make the determination with respect to these cases.¹ The request for CCISO to make a determination regarding relief should be sent to:

IRS-CCISO
Stop 840F

¹ Chief Counsel attorneys should not move the Tax Court to remand these cases to the Service to make a determination regarding relief under section 6015(f) because the Tax Court has held that section 6015 does not provide for remand. See Friday v. Commissioner, 124 T.C. 220 (2005).

P.O. Box 120053
Attn: Department One Manager
Covington, KY 41012

If overnight mail is used, the file should be sent to the following street address:

IRS-CCISO
201 West Rivercenter Boulevard
Stop 840F
Attn: Department One Manager
Covington, KY 41011

Requests should be marked “EXPEDITE-TAX COURT CASE PENDING” and include the Form 8857, the Tax Court petition and any other relevant documents and information in the attorney’s possession that would assist CCISO in making a determination. The request should specify that CCISO provide the results of their consideration directly to Counsel and should not issue a determination letter.

In newly-docketed cases, the administrative file should be requested only after CCISO completes its determination on the merits. During the pendency of CCISO’s determination, attorneys should remain in close contact with CCISO and should request copies of documents necessary to file a timely answer.

Questions regarding submitting requests for determinations and the status of the requests can be made by telephoning CCISO at (859) 669-3477. If a case is on a trial calendar less than 60 days away, a Motion for Continuance may be appropriate in order to give the Service sufficient time to review the merits of the claim.

If CCISO determines the petitioner is not entitled to relief under section 6015(f), a status report should be filed with the Tax Court setting forth the Service’s determination and attaching CCISO’s written analysis as an exhibit. If the petitioner requests Appeals consideration of the denial of relief and there is sufficient time before the trial calendar, the case should be referred to Appeals under normal procedures. If there is not sufficient time before the trial calendar, but the parties agree that having Appeals review the claim would facilitate settlement of the case, then the parties should request a continuance to allow time for Appeals to review the determination.² If settlement cannot be reached and Appeals affirms CCISO’s denial of relief, a further status report should be filed with the Tax Court setting forth the Service’s final determination and attaching Appeals’ written analysis (usually an Appeals Case Memorandum) as an exhibit.

² For docketed cases in which the nonrequesting spouse either jointly petitioned with the requesting spouse or intervened within the 60-day period provided by T.C. Rule 325(b), the Service cannot provide relief to, nor settle with, the requesting spouse, unless the nonrequesting spouse agrees and is a party to the settlement. *Corson v. Commissioner*, 114 T.C. 354 (2000). If the nonrequesting spouse is not a party, then the Service may settle the case with the requesting spouse.

If CCISO (or Appeals after CCISO initially denied relief) determines the petitioner is entitled to relief, the case should be conceded (unless the determination is only for partial relief), subject to the limitation that a nonrequesting spouse who is a party to the case must agree with, and sign off on, appropriate stipulations and decision documents. A stipulation of settled issues may still be filed with the petitioner, even if the nonrequesting spouse disagrees. If the nonrequesting spouse disagrees with the Service's determination to grant relief, then a status report should be filed with the Tax Court setting forth the Service's determination and attaching CCISO's (or Appeals') written analysis as an exhibit. In these cases, the grant of relief must be defended throughout trial and briefing.

Questions concerning this Notice should be directed to Branch 1 or 2 of Procedure and Administration at (202) 622-4910 or (202) 622-4940, respectively.

Deborah A. Butler
Associate Chief Counsel
Procedure and Administration